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No. 06-713

In The
Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON; ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

JOHN J. WHITE, JR.*
KEVIN B. HANSEN
LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
(425) 822-9281

Counsel for Respondent
Washington State Republican Party
**Counsel of Record*

LOCSEC LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (202) 342-2831

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ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. VI, cl. 2 provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

WASH. ADMIN. CODE § 434-230-170, prior to July 29, 2005 injunction, provided in part:

"AMENDATORY SECTION (Amending WSR 04-15-089, filed 7/16/04, effective 8/16/04)

"WAC 434-230-170 ((~~Electronic voting devices~~)) Ballot form. Each office on the ballot shall be identified, along with a statement designating how many candidates are to be voted on for such office. . . . Following the office designation the names of all candidates for that position shall be listed. . . . If the position is a partisan position, the party preference or independent status of each candidate shall be listed next to the candidate. The party preference must be listed exactly as provided by the candidate on the declaration of candidacy unless limited space on the ballot necessitates abbreviation or the party description provided is, in the opinion of the county auditor, obscene . . . ."

STATEMENT OF THE CASE

Fundamental to the First Amendment right to associate is the ability of an organization to define the scope of its association. The selection of candidates to present to the general electorate is a basic function of a political party. *California Democratic Party v. Jones*, 530 U.S. 567, 575, 581 (2000). A State may not forcibly redefine the scope of the Republican Party's ("the Party") association at the crucial juncture of selecting its standard bearer for the general election. This prohibition applies with equal force whether the State's motivation is paternalistic, as in *Tashjian v. Republican Party*, 479 U.S. 208 (1986), or hostility to the ideological bent of party candidates, as in *Jones*.

Washington's Initiative 872 ("I-872") is unconstitutional because it severely burdens the Party's First Amendment rights by forcing the Party (1) to have its standard-bearer selected by nonmember and rival party voters and (2) to accept a candidate's self-designation as a Republican, even if his views are anathema to the Party. This severe burden is not justified by *any* State interests, compelling or otherwise, advanced by I-872.

I-872's selective amendments to portions of Washington's partisan election system are cosmetic changes to its prior, unconstitutional blanket primary. Both the District Court and the Ninth Circuit correctly concluded that the State may not defeat fundamental First Amendment rights through statutory wordplay. I-872's plain language demonstrates that it selects the Party's standard-bearer. Even if, however, the Grange were correct that I-872 does not select the Party's standard-bearer, the Grange's initiative would still be unconstitutional by stripping away

the Party's right to nominate candidates, leaving the Party with only the right to endorse.

REASONS FOR DENYING THE PETITION

I. I-872 Is a Repackaged Version of the Blanket Primary Struck Down by this Court in *Jones*.

I-872 is by its very terms a partisan primary. Grange App. 119a (I-872, § 7(2)). It is not, and was never intended to be, a "nonpartisan blanket primary." The official ballot explanation shows that I-872 simply re-created the unconstitutional blanket primary:

> Last year the state party bosses won their lawsuit against the blanket primary. . . . Most of us believe that [the] freedom to select any candidate in the primary is a basic right. *Don't be forced to choose from only one party's slate of candidates in the primary.*
>
> * * *
>
> The September primary this year gave the state party bosses more control over who appears on our general election ballot at the expense of the average voter. *I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary.*

Ct. App. ER 257 (emphases added). I-872's effectiveness was even expressly dependent on this Court not overturning the Ninth Circuit's application of *Jones* to Washington's former blanket primary. Grange App. 116a-117a; 125a-126a (I-872, §§ 2, 18).

The modified blanket primary under I-872[1] is identical in all constitutionally significant ways with the blanket primary systems already held unconstitutional by this Court in *Jones* and the Ninth Circuit in *Democratic Party v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213, *cert. denied sub nom., Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004). Likening I-872 to those blanket primaries, the District Court below correctly recognized that I-872 operates to nominate the Republican Party's candidates:

> In all constitutionally relevant respects, Initiative 872 is identical to the blanket primary invalidated in *Reed*: (1) Initiative 872 allows candidates to designate a party preference when filing for office, without participation or consent of the party; (2) requires that political party candidates be nominated in Washington's primary; (3) identifies candidates on the primary ballot with party preference; (4) allows voters to vote for any candidate for any office without regard to party preference; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and allows crossover voting; and (6) advances candidates to the general election based on open, "blanket" voting.

Grange App. 72a.

The participation of nonmembers in selecting the Republican Party standard-bearer "has the likely outcome . . . of changing the parties' message." 530 U.S. at 581. Just

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[1] I-872's primary system was described by its proponents under a variety of names including "modified blanket primary," "People's Choice Initiative," "Qualifying Primary," "Top Two Primary," and "Cajun Primary." Ct. App. ER 18, 21, 28, 141, 150.

as in *Jones*, changing the nominees and positions at the Republican Party was the "intended outcome" of I-872.

The Washington State Grange ("the Grange") sponsored and promoted I-872 for the express purpose of altering the identity and policy positions of candidates appearing as Republicans on the general election ballot. The official voter's pamphlet statement in support of I-872, prepared by the Grange, confirmed this intent to adulterate the Republican Party's message: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." Ct. App. ER 257. The purpose was to supplant the standard bearer of the Republican Party and its adherents with someone else: "This proposed initiative will ensure that the candidates who appear on the general election ballot are those who have the most support from the voters, not just the support of the political party leaders." Ct. App. ER 22-23. Elsewhere in its promotional documents for I-872, the Grange explained that "[candidates] will not be able to win the primary by appealing only to party activists." The initiative was designed to give "voters the kind of control that they exercised for seventy years under the blanket primary." Ct. App. ER 29.

In reality, the Grange's "modified" blanket primary is nothing more than a repackaged blanket primary, as seen by the heading of its own press release announcing I-872: "Grange files initiative to *preserve* state's primary systems." Ct. App. ER 512 (emphasis added). As such, it is unconstitutional for the same reasons set forth by this Court in *Jones*. The Grange's interest in selecting Republican candidates for the general election was squarely addressed in *Jones* and rejected:

> As for the associational "interest" in selecting the candidate of a group to which one does not belong, that falls short of a constitutional right, if indeed it can even fairly be characterized as interest. It has been described in our cases as a "desire" – and rejected as a basis for disregarding the First Amendment right to exclude.

530 U.S. at 573.

II. A Candidate's Desire to Appropriate the Republican Party Name on the Primary Ballot Does Not Override the Party's Right to Determine the Scope of Its Association.

"Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981) (internal quotation marks and citation omitted). I-872's party designation provisions shift the determination of who may become a representative of the Republican Party from the Party and its adherents to any individual who wishes to appropriate the Party mantle. Grange App. 117a (I-872, § 4). The State's emergency regulations to implement I-872 confirmed that it deprived the Republican Party of the right to decide whether to associate with a candidate on the primary or general election ballot. WASH. ADMIN. CODE § 434-230-170 (2005) mandated that a candidate's "party preference . . . be listed [on the ballot] exactly as provided by the candidate on the declaration of candidacy." Ct. App. ER 377-78.

Neither the District Court nor the Ninth Circuit issued its opinion in a vacuum. Each followed a long line of

precedent established by this Court and applied by other courts in protecting core First Amendment rights of political parties. The First Amendment protects the right to determine the scope of association, including the right to exclude certain voters at the crucial juncture when the party is selecting its standard-bearer. This right was expressly recognized by this Court over 25 years ago. *La Follette*, 450 U.S. at 122 ("The freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association."). The right to exclude has its greatest importance at just the moment the Grange seeks to intrude upon. "In no area is the political association's right to exclude more important than in the process of selecting its nominee." *Jones*, 530 U.S. at 575.

The reason that the Party's right to exclude in the process of "selecting its nominee" is so critical is because "it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." *Id.* The association between a party and nominee must be one of *mutual* association. The party must want to associate with the candidate and the candidate to associate with the party. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). A unilateral desire to associate is not enough. In upholding Minnesota's ban on fusion tickets in *Timmons*, this Court noted that the New Party was free to convince a person it wanted as its nominee to decline association as the nominee of another party: "Respondent is free to try to convince Representative Dawkins to be the New Party's, not the DFL's, candidate." *Id.* at 360. Absent mutuality, the New Party could

not associate with the nominee of another party *on the ballot.*[2]

The requirement of mutuality between associations and their members is confirmed in other First Amendment contexts as well. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (parade organizers had right to exclude group whose message was deemed inconsistent by organizers, notwithstanding contrary state statute); *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

In *La Follette,* this Court considered whether a Wisconsin law burdened a political party's associational rights and stated that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party." 450 U.S. at 123-124. In this case, the Ninth Circuit determined that I-872 "forces political parties to be associated with self-identified candidates not of the parties' choosing . . . [which] constitutes a severe burden upon the parties' associational rights." Grange App. 20a. This is in accord with *La Follette* and the holdings of other circuits.

Two decisions from the Eleventh Circuit confirmed that David Duke, the segregationist, has no "right to

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[2] The Court noted that the New Party was free to support the nominee of another Party, but that did not translate into the right to associate on the ballot itself. 520 U.S. at 363. "Ballots serve primarily to elect candidates, not as forums for political expression." *Id.* As in *Timmons*, candidates are still able to express their "preference" for the Republican Party, without restriction. As in *Timmons*, that preference may not be shown *on the ballot* unless the association is mutual.

associate with an 'unwilling partner.'" *Duke v. Massey*, 87 F.3d 1226, 1234 (11th Cir. 1996). In *Massey*, the court recognized that "[t]he Republican Party has a First Amendment right to freedom of association and an attendant right to identify those who constitute the party based on political beliefs." *Id.* Similarly, in *Duke v. Cleland*, 954 F.2d 1526, 1530 (11th Cir. 1992), the court held that the Republican Party legitimately exercised its right of association in excluding David Duke as a Republican Party candidate.[3]

The District of Columbia Circuit explained the critical importance of mutuality in *LaRouche v. Fowler*, 152 F.3d 974, 995-96 (D.C. Cir. 1998):

> [I]t is the *sine qua non* of a political party that it represents a particular political viewpoint. And it is the purpose of a party convention to decide on that viewpoint, in part by deciding which candidate will bear its standard: the liberal or the conservative, the free trader or the protectionist, the internationalist or the isolationist.
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> * * *
>
> The Party's ability to define who is a "bona fide Democrat" is nothing less than the Party's ability to define itself.

The lower court decisions do not prevent candidates from saying that they prefer the Republican Party. The injunction below simply prevents a candidate from running as a "Republican" on the official state election ballot

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[3] That Georgia's statutes respected, rather than invaded, the Republican Party's First Amendment rights in no way alters the existence and extent of those rights.

where the Party has identified that candidate as outside the scope of its association. The lower courts rightly held that the designation "Republican" on the ballot belongs only to those candidates who are within the scope of the Republican Party's association.

III. The Lower Courts Violated Neither the Principle of Separation of Powers Nor Federalism in Striking Down Washington's Invasion of the Republican Party's Right to Associate.

The Grange's contention that the Ninth Circuit struck down I-872 based on a hypothetical reveals a fundamental misreading of both the Ninth Circuit and District Court opinions, and provides no basis for *certiorari*. The lower courts struck down I-872 because it imposed a severe burden on the core First Amendment right to free association, unsupported by a compelling state interest. Grange App. 20a, 29a-30a, 75a, 79a. The Ninth Circuit's hypothetical, illustrating one of the ways in which I-872 invaded core First Amendment rights, was just that, an illustration.

The District Court expressly noted the strong presumption of constitutionality of both statutes and initiatives. Grange App. 53a. However, the presumption was overcome by the presence of a severe burden on core First Amendment rights, without a countervailing compelling state interest. The Ninth Circuit likewise noted that I-872's defenders "have not identified any compelling state interests – apart from those the Supreme Court rejected in *Jones* – that would justify the Initiative's severe burden on the political parties' associational rights; nor is Initiative 872's modified blanket primary narrowly tailored." Grange App. 4a. Neither violated separation of powers by declaring

an invalid enactment invalid. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

In a lengthy footnote, the Grange urges *certiorari* based on a failure to sever. However, both lower courts considered severability, and determined that I-872 was not severable.[4] According to the Ninth Circuit, "[w]e cannot sever the unconstitutional provisions from Initiative 872 because 'it cannot reasonably be believed that' Washington voters would have passed Initiative 872 without its unconstitutional provisions." Grange App. 4a (quoting *McGowan v. State,* 148 Wash. 2d 278, 60 P.3d 67, 75 (2002)). The District Court concluded that I-872's provisions were so intertwined and interdependent that it could only sever the numerous unconstitutional provisions through a wholesale re-writing of the initiative, which would have violated the separation of powers doctrine. Grange App. 86a, 89a. Despite urging review to conduct a severability

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[4] Washington's Supreme Court recently described the test for severability:

> Ordinarily, only the part of an enactment that is constitutionally infirm will be invalidated, leaving the rest intact. An unconstitutional provision may not be severed, however, if its connection to the remaining, constitutionally sound provision is so strong "that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." Also, the court is obliged to strike down the entire act if the result of striking only the provision is to give the remainder of the statute a much broader scope.

In re Parentage of C.A.M.A., 154 Wash. 2d 52, 67, 109 P.3d 405 (2005) (quoting *Guard v. Jackson*, 83 Wash. App. 325, 333, 921 P.2d 544 (1996)).

analysis, the Grange identifies no error in either lower court's severability analysis.

Declaring I-872 invalid was fully in accord with principles of federalism and the supremacy of the federal constitution. *See* U.S. CONST. art. VI, cl. 2. It is black letter law that the First Amendment restrictions on governmental regulation of the right to associate apply to the States through the Fourteenth Amendment. The Grange's assertion that principles of federalism warrant *certiorari* because the lower federal courts invoked the First Amendment to strike down a Washington statute that invaded the right to associate is meritless, and needs no further comment.

IV. The Lower Courts Expressly Did Not Decide the Question the Grange Asserts Has "Additional Nationwide Significance." A Petition for Writ of *Certiorari* Should Not Be a Vehicle for Bypassing Lower Federal Courts.

There is no "additional nationwide significance" to this case that would support review. Grange Pet. at 29. The District Court expressly stated that its order "did not decide whether the 'Montana' primary filing statute, WASH. REV. CODE § 29A.24.031, was unconstitutional as part of the 'Montana' primary system." Grange App. 99a. In seeking "review" of a decision that has not been made, the Grange asks this Court either to issue an advisory opinion or resolve the constitutionality of Washington's current filing statue as an exercise of original jurisdiction. Neither is appropriate.

CONCLUSION

The lower courts correctly applied this Court's long line of cases prohibiting States from compelling an organization to associate with persons that the organization had determined are outside its scope of association. *Jones* recognized that forced association is especially injurious to a political party at the "crucial juncture" at which its standard-bearer is chosen. This Court should not devote its scarce resources to revisiting the scope of fundamental First Amendment rights each time a State overreaches.

Respectfully submitted,

JOHN J. WHITE, JR.*
KEVIN B. HANSEN
LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
425-822-9281

**Counsel of Record*

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